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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

FRANK CONVERSE, ET AL.,
Petitioners,

vs.

GEORGE J. IGEL & CO., INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Mr. Richard L. Miller and
Mr. John W. Palmer,
150 East Broad Street, Columbus, Ohio,
Attorneys for Petitioners.

Mr. Thomas W. Applegate,
8 East Broad Street, Columbus, Ohio,
Attorney for Respondent.

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I.

STATEMENT OF THE CASE

There are numerous errors and false conclusions throughout the petition, some of which we feel obligated to call to the Court's attention.

In the first paragraph petitioners refer to "a collective bargaining agreement dated July 23, 1961". We believe this is an error as no such agreement was mentioned in the petition filed in the Trial Court. The agreement which contained the clause out of which the controversy arose is dated July 23, 1959, as is evident by the sixth paragraph of the petition of petitioner. If there is a different contention, this is the first time that the matter has been raised.

We take issue with the fifth paragraph of the petition (page 5) which reads in part as follows "and at all times relevant

hereto, served as its chairman and chief spokesman". According to George J. Igel, and as found by the Trial Court, a jury having been waived by both sides, "In that agreement George Igel took no part and, as a matter of fact, was attempting to reach a separate agreement".

In the seventh paragraph of the statement of facts(page 5) the first sentence states a fact that was controverted and which the Trial Court obviously resolved in favor of the respondent, namely: "during June and July, 1959, at which George J. Igel was present and functioned as the employer spokesman". In the same paragraph the petitioner states that a memorandum of an agreement was drawn up and executed on July 23, 1959, which set forth the agreement between the parties. The memorandum to which the petitioner refers was not executed. It was admitted by the Court over the objection of respondent, "for what it was worth".

The ninth paragraph of the petition on page 6 states as follows:

> "The new agreement obligated the members of BTEA employing operating engineers to pay ten cents per hour for each hour worked by an operating engineer, commencing November 1, 1959, into a *trust fund,* to be established pursuant to Section 302 of the Taft-Hartley Act." (underscoring ours)

At page 22 of the petition the petitioner sets forth the paragraph of the July 23, 1959, contract, signed about one week later, which forms the basis of this case. It is as follows:

> "10. Ten cents per hour worked shall be paid on and after November 1, 1959, for a Welfare Program trust fund to be created and approved by a Joint Committee of Union and Employer representatives on which the Association herein shall have representation or shall have representation on the Committee selecting such joint Committee to create and establish such Welfare Program trust fund. In the event such Welfare Program trust fund is not established and approved by November 1, 1959, the

said ten cents per hour worked payment of this paragraph shall be paid instead to employees covered hereby as wages, unless otherwise mutually agreed by the parties hereto."

We fail to see any provision as to a "trust fund" in the quoted provision of the July 23, 1959, agreement. This executory provision was not included in the bargained contract but was added later (R. p.38).

On page 7 of the petition, petitioner attributes to the Trial Court a finding that state law was applied rather than federal substantive law. With this we cannot agree. The Court was referring to the executory provision of the July 23, 1959, agreement and the finding is consistent with federal substantive law. At the bottom of page 7 the petitioner again draws a conclusion from a fact which was controverted and which the Court found in favor of the respondent.

II.

REASONS FOR NOT ALLOWING THE WRIT

The error which led the petitioner astray is made in the last paragraph of VII on page 10 of the petition. In the first place the Trial Court did not refuse to apply federal substantive law and secondly the facts were not undisputed. The Trial Court held (1) that federal substantive law did not prevent the employer from withdrawing from the employer association, (2) the employer did so withdraw, (3) upon the facts presented the petitioner did not establish a case of liability for payments by the respondent to the Health and Welfare Fund during the period November 1, 1959 to January 1, 1961.

1. Federal Substantive Law did not Prevent the Employer from Withdrawing from the Multi-Employer Bargaining Unit.

In the case of *In the Matter of Pacific Metals Company* Ltd., et al., etc., 91 NLRB 696, the Board in passing on the question of withdrawal of an employer from a multi-employer unit made the following statement at page 699:

"The Board has held that the essential element warranting the establishment of multi-employer units is clear evidence that the employers unequivocally intend to be bound in collective bargaining by group rather than individual action. The correlative standard for excluding an employer from such a unit is evidence of an intent to pursue an individual course of action with respect to labor relations. *The evidence which suffices to establish either intent varies with the circumstances involved.* Here group bargaining has been based on an association. Under circumstances such as are here present, the Board has held that an employer by withdrawing from the association evidences an intention of abandoning group action and to pursue an independent course of bargaining. *Participation for a substantial period of time in group bargaining does not preclude an employer from abandoning such bargaining.* And once such bargaining has been abandoned, the factor which warrants a conclusion that only a multi-employer unit is appropriate has been removed." (underscoring ours)

The instant case was tried to the Court by the choice of both parties. The Court as the trier of the facts found that the George J. Igel Co., Inc. resigned from the employer association; that at the first opportunity after so withdrawing such fact was conveyed to the Union agent; that subsequently the Union carried on individual negotiations with the Company as respects a Health and Welfare Plan, and that by virtue of such facts the Company was not bound by the subsequent actions of the employer association.

Examine the July 23, 1959, agreement as it pertains to the Health and Welfare Fund. It was testified by Frank Converse, the Union Business Manager, as follows:

Q. Actually, the contract as negotiated between BTEA and the Union, contained no provisions for the Health and Welfare Program Plan?

A. That's right.

Q. It was inserted after the negotiations had finished,

isn't that correct? Isn't that right?

A. That's right.

This corroborates the testimony of George Igel that this provision was not negotiated by the committee prior to the end of negotiations. Also, Petitioners' Exhibit 7, is a "memorandum of agreement" that purports to incorporate the provision for the Health and Welfare Fund into the negotiated contract. Where are the signatures of the negotiating committee? Surely this document has some meaning. It is supposedly a later agreement of the negotiating committee. It was never signed, nor as a matter of fact ever implemented. The testimony of Converse was to the effect that BTEA set up a bank account to receive escrow funds. This is not true and no evidence of such an arrangement was ever shown to exist. Again the Union recognized that further negotiations and agreements were needed when they tried to introduce evidence of a verbal agreement between Fred Hauck who was deceased before the trust agreement was executed and one of the Union members who was not even a member of the negotiating committee. Furthermore, about seventeen months after the July 23, 1959, agreement, to-wit: on December 14, 1960, the executive secretary of the Health and Welfare Fund sent the Respondent, the George J. Igel Co., Inc., an envelope (Respondent's Exhibit "A"), (R.p.99) containing the documents shown as Respondent's Exhibits B, C, D, E and F. (R.p.99). It is noted that Respondent's Exhibit C is part of the Appendix "B" agreement of the Ohio Contractors Association providing for the escrow of funds; Respondent's Exhibit D shows that it was necessary for the Ohio Contractors to ratify this agreement as a group; and Respondent's Exhibit F is a registration form and an agreement to be bound.

The question that immediately is asked is were there similar documents for BTEA and if so where are they? Why is there no evidence that BTEA ratified this plan? The memo-

randum of agreement was not signed. No individual registration forms were mentioned as having been tendered to other members of BTEA. The fact is the George J. Igel Co., Inc., was being asked to subscribe as an individual employer to the "Ohio Contractors Operating Engineer's Joint Health and Welfare Plan". What further evidence of individual negotiations is needed? The Igel Company read the material, sought legal counsel and agreed to be bound by the agreement as of January 1, 1961, from which date it has filed the necessary forms to determine liability.

All of the talk about federal substantive Law cannot cure the defects in the evidence produced by petitioners to show respondent's liability by virtue of the July 23, 1959, agreement. In summary the defects are as follows:

1. The Health and Welfare clause was not negotiated to settlement by the negotiating committee. The contrary is shown by Petitioner's Exhibit 7 and testimony of Frank Converse.
2. No competent evidence was produced to show any agreement to pay for the period November 1, 1959, to March 11, 1960, as contemplated by the June 23, 1959, agreement.
3. The appendix "B" agreement (Respondent's Exhibit C) shows that the Health and Welfare Plan was ratified by the Ohio Contractors Association subsequent to July 23, 1959. No such ratification or subsequent agreement is shown as to BTEA.
4. The respondent was requested to sign an agreement to be bound thereby evidencing individual negotiations. (Respondent's Exhibit F)

2. **Was there any Agreement Entered Into Between the BTEA and the Union that would Obligate the Respondent to Petitioners Without Acceptance by Respondent for the Period March 11, 1960 to January 1, 1961?**

The alleged Trust Agreement which forms the basis of this case as respects the alleged payments due from March 11,

1960 to May 1, 1961, is marked Petitioners' Exhibit 4. The parties to this agreement purport to be the various "employer associations" and the "union". Paragraph one states that the members of the "employer associations" are set forth in schedules attached to the document. The BTEA members are purported to be set forth in "Schedule D", "which is attached hereto and made a part hereof". There is no "Schedule D" attached. This agreement purports to be signed by the "duly authorized Employer representative of * * * Building Trades Employers' Association of Columbus". The signature appears to be "Wayne M. Dombrier, Acting Executive Secretary". No evidence whatsoever was produced to identify Dombrier, nor to establish his authority. The evidence was to the effect that one Parker Garwick represented the BTEA in the negotiations of this Trust Agreement. The introduction of this document was objected to by respondent and the Court admitted it over objection saying that it would not be prejudicial.

Federal law may make a collective bargaining agreement a different kind of contract. However, the manner of proving a contract and the identity and authority of the person signing the contract is governed by state law. There is no evidence that the acting executive secretary of this association had any authority to sign this agreement. Respondent's Exhibit 6 reveals that "the affairs of the Association (BTEA) shall be conducted by the seven member Board of Directors", (Article III, Section 6). There is nothing in the record showing a resolution of that Board delegating this power to the executive secretary nor any resolution of that Board referring in any manner to the execution, acceptance or ratification of the document. The answer of respondent put these matters in issue. The burden of proof was on the petitioners. In whatever form an authority is asserted to be the burden of proving it is on the party claiming the benefit of its exercise. In this case the petitioners are relying on the authority of the

BTEA to bind the respondent to the terms of the trust agreement. In order to establish this authority it would be necessary for petitioners to offer "Schedule D" to show that respondent was a member of BTEA on March 11, 1960, and in fact to show that BTEA had a membership on March 11, 1960. Further it would be necessary to show the authority of Dornbrier. In the absence of this proof a ratification or acceptance of the agreement must be shown.

While there is no evidence to show that the Trust Agreement of March 11, 1960, was accepted or ratified by the BTEA, there is evidence that respondent did, after receiving a copy of it, file the forms to determine liability from the first day of the following month, January, 1961. There could be no liability to pay into the fund on the part of the respondent prior to this date.

3. Who are the Proper Parties-Plaintiffs in this Action?

This action was allegedly brought by the Trustees of the "Ohio Operating Engineers Health and Welfare Plan". The style of the case does not reveal the capacity of the plaintiffs. Don Gassen testified that they were trustees in 1961. The trust agreement provides a Section 5.16 as follows:

> "All suits and proceedings to recover Employer payments or to enforce or protect any other right, demand or claim on behalf of the Trustees shall be instituted by the Administrator of the fund in his capacity as such."

This is a clearly written and understandable provision. The real plaintiffs in this action by terms of the instrument itself is the Administrator not the trustees.

SUMMARY

The petitioners base their cause of action on two documents, (1) the contract dated July 23, 1959, and (2) the Trust Agreement dated March 11, 1960. The provision as to the Health and Welfare Fund in the July 23rd agreement is execu-

tory. Further action was necessary. The Union and the BTEA did not take action subsequent to July 23rd in a manner that would legally bind the members of BTEA and the George J. Igel Co., Inc., in particular, who had resigned from BTEA membership.

The authority of the employee of BTEA to sign the Trust agreement, dated March 11, 1960, was not shown, nor is there any showing that the Trust Agreement was executed, accepted, or ratified by the Board of Directors or membership of BTEA. Such execution and ratification on the part of the Ohio Contractors Association is shown by Respondent's Exhibit "B".

The Union negotiated regarding the Health and Welfare Plan with the George J. Igel Co., Inc., and submitted it a registration form and agreement to be bound. After submission of these documents on December 14, 1960, the respondent, George J. Igel Co., Inc., agreed to participate and to be bound from January 1, 1961. No payments were made from January 1, 1961, to May 1, 1961, because of the pendency of this action.

CONCLUSION

The Court did not err in holding that the respondent, George J. Igel Co., Inc., was not bound to make payments to the Ohio Operating Engineers Health and Welfare Plan as claimed by petitioners in their petition for the reasons stated in this brief. The petition for a writ of certiorari should be denied.

Respectfully submitted,

Thomas W. Applegate
Attorney for Respondent

END